Linde Malaysia Sdn Bhd (formerly known as Mox-Linde Gases Sdn Bhd) v Ewajaya Sdn Bhd

HIGH COURT (SHAH ALAM) — WRIT SUMMONS NO BA-22NCC-58–09 OF 2018
TEE GEOK HOCK JC
7 MARCH 2022

Contract — Distribution agreement — Plaintiff supplier of industrial gases sued distributor for unpaid rentals on gas cylinders taken but not returned, replacement costs on equipment taken but not returned and for damage caused to equipment that had been returned — Whether documentary evidence plaintiff relied upon to support its claims was wholly inaccurate and unreliable — Whether trial court could only allow those parts of plaintiff's claims which had either been admitted by defendant or were supported by separate and independent corroborative evidence — Whether defendant's counterclaim had no merit and had to be dismissed

The plaintiff was a supplier of industrial gases in cylinders. The defendant was one of the plaintiff's gas distributors in Malaysia. In the instant suit, the plaintiff sought to recover from the defendant: (a) RM187,852.66 as outstanding monthly rentals on gas cylinders the defendant had taken from the plaintiff but had not returned; (b) RM3,272,550 being the value of various types of equipment (cylinders, delivery pallets, cylinder caps etc) of the plaintiff which the defendant had taken but had not returned; and (c) RM189,450 in respect of damage caused to 11 pallets and gas cylinders that the defendant had returned. The defendant denied all of the plaintiff's claims and alleged that it had overpaid the plaintiff in the sum of RM914,038.28. The defendant counterclaimed for payment of that sum. In its defence, the defendant contended that the plaintiff's claims were unsustainable because, inter alia: (i) the defendant could not in all cases be held responsible for damage to the cylinders and equipment since in many instances the items supplied by the plaintiff were old, rusty and badly corroded; (ii) several of the plaintiff's claims were time-barred under the Limitation Act 1953; and (iii) the plaintiff's prolonged delay in raising a claim for damage to goods supplied prejudiced the defendant because it could not seek reimbursement or compensation for the same from its customers who had caused the damage while the equipment were in their custody.

Held, dismissing the defendant's counterclaim and ordering the defendant to pay the plaintiff RM13,200 with interest thereon at 5%pa from 1 April 2016 until date of full payment and a further sum of RM22,058 with interest thereon at 5%pa from 1 November 2017 until date of full payment:

(1) In order for the court to assess the quantities of the items claimed by the plaintiff, the plaintiff's records and account had to be corroborated by other independent or separate evidence. The print-out records from the plaintiff's internal computerised accounting and inventory system ('the SAP system') which formed the primary evidential basis for the plaintiff's claim were fraught with errors, anomalies and discrepancies and were unreliable as evidence to prove the plaintiff's case (see paras 2, 4 & 114).

(2) The plaintiff had based its claims for unpaid rentals, damages to equipment and replacement costs of lost equipment on computer print-outs from its SAP system, copies of delivery notes and tabulated summary of the claimed items, quantities and amounts. The plaintiff did not produce copies of all relevant source records of equipment returned by the defendant or its customers. None of the plaintiff's staff who keyed in the entries into the SAP system were called to testify. The plaintiff's witnesses who testified could not explain why adjustments had been made, for which periods of time the adjustments were made and how much rentals were previously charged to the defendant's account before the dates of the adjustment entries (see para 115).

(3) The only heads of the plaintiff's claims which were corroborated by independent or separate evidence were: (a) one pallet and 25 cylinders which the defendant admitted that it was still keeping; and (b) damage to 11 pallets and 124 cylinders which were returned to the plaintiff in October 2017. The goods in (a) above were supplied to the defendant in or before February 2016 and despite the lapse of more than five years since then, the defendant was still keeping them. The plaintiff was therefore entitled to claim for replacement costs of the said items, but at 40% of the contracted rates since the items appeared to be very old. This would give a total replacement cost of RM13,200. As for item (b) the court accepted the independent and corroborative evidence of PW3 and PW4 that the goods were in a damaged state when they were returned by the defendant to the plaintiff in October 2017. Since the pallets and cylinders were reusable after they were painted, the defendant had to pay for the painting cost plus 11 months of rental for the delay in returning the items after the agreement between the parties had expired. Based on the contracted rates, the cost of repainting the pallets and cylinders amounted to RM1,620 while the 11 months' rental amounted to RM20,438, thus giving a grant total of RM22,058 as far as the goods in item (b) were concerned (see paras 116–129).

(4) All the other claims of the plaintiff had to be dismissed because, inter alia: (a) the plaintiff had not discharged its burden of proof on liability issues; (b) the SAP records were unreliable as evidence; (c) the plaintiff's credit notes failed to fully eliminate or erase the errors, anomalies or discrepancies in the SAP system; (d) the plaintiff's unduly long delay in

claiming for damage to or loss of equipment disabled the defendant from seeking reimbursement or compensation from its customers who had caused such damage or loss; (e) the plaintiff failed to specifically prove that in all cases the damage to equipment was caused by the defendant as there was evidence to show that the plaintiff had supplied the defendant with cylinders that were in a very bad condition (ie, old, rusty and corroded); and (f) some of the items claimed by the plaintiff were time-barred under the Limitation Act 1953 (see para 130).

(5) The defendant's counterclaim had to be dismissed. The defendant's contention that it was entitled to set off a total amount of RM1,047,134.46 (the total value of credit notes issued by the plaintiff) against the plaintiff's claim was baseless as the plaintiff had already taken that figure into account in computing the amount owing by the defendant. The defendant had also failed to discharge its burden of proving that it had overpaid the plaintiff. The defendant relied upon the plaintiff's SAP records to prove overpayment which the court had already found was inaccurate and unreliable to prove either an underpayment or an overpayment by the defendant. To support either contention, there had to be independent or separate corroborative evidence, which was lacking (see paras 110–113 & 131).

[Bahasa Malaysia summary

Plaintif adalah pembekal gas industri dalam silinder. Defendan adalah salah seorang pengedar gas plaintif di Malaysia. Dalam tindakan semasa, plaintif memohon mendapatkan semula daripada defendan: (a) RM187,852.66 atas sewa bulanan tertunggak bagi silinder gas yang defendan telah ambil daripada plaintif tetapi tidak dipulangkan; (b) RM3,272,550 yang merupakan nilai pelbagai jenis peralatan (silinder, palet penghantaran, penutup silinder etc) plaintif yang telah diambil oleh defendan tetapi tidak dipulangkan, dan (c) RM189,450 atas kerosakan yang disebabkan oleh 11 palet dan silinder gas yang telah dipulangkan oleh defendan. Defendan menafikan semua tuntutan plaintif dan mendakwa bahawa ia telah membayar lebih kepada plaintif dalam jumlah RM914,038.28. Defendan menuntut balas untuk pembayaran jumlah tersebut. Dalam pembelaannya, defendan berpendapat bahawa tuntutan plaintif adalah tidak dapat dipertahankan kerana, antara lain: (i) defendan tidak boleh dalam semua kes bertanggungjawab ke atas kerosakan pada silinder dan peralatan memandangkan dalam banyak keadaan barang-barang yang dibekalkan oleh plaintif adalah lama, berkarat dan reput; (ii) beberapa tuntutan plaintif telah dihalang oleh had masa di bawah Akta Had Masa 1953; dan (iii) kelewatan plaintif yang berpanjangan dalam membangkitkan tuntutan kerosakan barang yang dibekalkan menjejaskan defendan kerana ia tidak dapat mendapatkan bayaran balik atau pampasan yang sama daripada pelanggannya yang telah menyebabkan kerosakan semasa peralatan berada dalam jagaan mereka.

Diputuskan, menolak tuntutan balas defendan dan memerintahkan defendan membayar plaintif RM13,200 dengan faedah ke atasnya pada kadar 5% setahun mulai 1 April 2016 sehingga tarikh pembayaran penuh dan jumlah tambahan RM22,058 dengan faedah ke atasnya pada 5% setahun dari 1 November 2017 sehingga tarikh pembayaran penuh:

(1) Bagi mahkamah menilai kuantiti barang yang dituntut oleh plaintif, rekod dan akaun plaintif perlu disokong oleh keterangan bebas atau berasingan yang lain. Rekod cetakan daripada sistem perakaunan dan inventori berkomputer dalaman plaintif ('sistem SAP') yang membentuk asas keterangan utama bagi tuntutan plaintif adalah penuh dengan kesilapan, anomali dan percanggahan serta tidak boleh dipercayai sebagai keterangan untuk membuktikan kes plaintif (lihat perenggan 2, 4 & 114).

(2) Plaintif telah mengasaskan tuntutannya untuk sewa yang belum dibayar, ganti rugi kepada peralatan dan kos penggantian peralatan yang hilang pada cetakan komputer daripada sistem SAPnya, salinan nota penghantaran dan ringkasan jadual item, kuantiti dan amaun yang dituntut. Plaintif tidak mengemukakan salinan semua rekod sumber berkaitan peralatan yang dipulangkan oleh defendan atau pelanggannya. Tiada seorang pun kakitangan plaintif yang memasukkan entri ke dalam sistem SAP dipanggil untuk memberi keterangan. Saksi plaintif yang memberi keterangan tidak dapat menjelaskan mengapa pelarasan telah dibuat, untuk tempoh masa yang mana pelarasan dibuat dan berapa banyak sewa yang sebelum ini dicaj kepada akaun defendan sebelum tarikh catatan pelarasan (lihat perenggan 115).

(3) Satu-satunya tuntutan utama plaintif yang disokong oleh keterangan bebas atau berasingan ialah: (a) satu palet dan 25 silinder yang diakui masih disimpan defendan; dan (b) kerosakan pada 11 palet dan 124 silinder yang dikembalikan kepada plaintif pada Oktober 2017. Barangan di (a) di atas telah dibekalkan kepada defendan pada atau sebelum Februari 2016 dan walaupun telah berlalu lebih daripada lima tahun sejak itu, defendan masih menyimpannya. Oleh itu, plaintif berhak menuntut kos penggantian item tersebut, tetapi pada 40% daripada kadar yang dikontrakkan memandangkan item tersebut kelihatan sangat lama. Ini akan memberikan jumlah kos penggantian sebanyak RM13,200. Bagi perkara (b) mahkamah menerima keterangan bebas dan menyokong PW3 dan PW4 bahawa barang tersebut berada dalam keadaan rosak apabila ia dipulangkan oleh defendan kepada plaintif pada Oktober 2017. Memandangkan palet dan silinder tersebut boleh diguna semula selepas ia dicat, defendan terpaksa membayar kos mengecat ditambah 11 bulan sewa untuk kelewatan pemulangan barang selepas perjanjian antara pihak tamat. Berdasarkan kadar yang dikontrakkan, kos mengecat semula palet dan silinder berjumlah

RM1,620 manakala sewaan selama 11 bulan berjumlah RM20,438, sekali gus memberikan jumlah keseluruhan sebanyak RM22,058 setakat mana barang di item (b) (lihat perenggan 116–129).

(4) Semua tuntutan lain plaintif terpaksa ditolak kerana, antara lain: (a) plaintif tidak melepaskan beban pembuktiannya mengenai isu liabiliti; (b) rekod SAP tidak boleh dipercayai sebagai keterangan; (c) nota kredit plaintif gagal menghapuskan atau memadam sepenuhnya kesilapan, anomali atau percanggahan dalam sistem SAP; (d) kelewatan plaintif yang terlalu lama dalam menuntut kerosakan atau kehilangan peralatan menyebabkan defendan tidak dapat mendapatkan bayaran balik atau pampasan daripada pelanggannya yang telah menyebabkan kerosakan atau kerugian; (e) plaintif gagal membuktikan secara khusus bahawa dalam semua kes kerosakan peralatan adalah disebabkan oleh defendan kerana terdapat keterangan yang menunjukkan bahawa plaintif telah membekalkan defendan dengan silinder yang berada dalam keadaan yang sangat buruk (iaitu, lama, berkarat dan reput); dan (f) beberapa barang yang dituntut oleh plaintif telah dihalang masa di bawah Akta Had Masa 1953 (lihat perenggan 130).

(5) Tuntutan balas defendan terpaksa ditolak. Pendapat defendan bahawa ia berhak untuk menolak sejumlah RM1,047,134.46 (jumlah nilai nota kredit yang dikeluarkan oleh plaintif) terhadap tuntutan plaintif adalah tidak berasas kerana plaintif telah pun mengambil kira angka tersebut dalam pengiraan jumlah tersebut yang terhutang oleh defendan. Defendan juga telah gagal untuk melepaskan bebannya untuk membuktikan bahawa ia telah membayar lebih kepada plaintif. Defendan bergantung kepada rekod SAP plaintif untuk membuktikan lebihan bayaran yang telah didapati oleh mahkamah adalah tidak tepat dan tidak boleh dipercayai untuk membuktikan sama ada kurang bayar atau terlebih bayar oleh defendan. Untuk menyokong mana-mana pertikaian, perlu ada bukti sokongan yang bebas atau berasingan, yang mana tidak ada (lihat perenggan 110–113 & 131).]

Cases referred to

Stamford College Bhd v Seri Stamford College Sdn Bhd (dahulu dikenali sebagai Stamford College (PJ) Sdn Bhd) & Anor [2021] MLJU 1386, HC (refd)

Legislation referred to

Limitation Act 1953

Emilia Van Buerle (with Nisha Mohan) (Peter Ling & Co) for the plaintiff.
Harcharanjit Singh (Harcharanjit Singh & Assoc) for the defendant.

Tee Geok Hock JC:

INTRODUCTION

[1] The plaintiff, supplier of industrial gases in cylinders, filed this suit against the defendant, one of its gas distributors in Malaysia.

[2] The plaintiff's primary evidential basis for its claims against the defendant is founded upon a set of print-out records of its internal computerised accounting and inventory system maintained by its own staff and to which its gas distributors including the defendant had no access and could not key in any input data at any juncture at the material times. The plaintiff's records of its internal computerised accounting and inventory system were not supplied to the defendant for comments or verification during the material times of the transactions.

[3] The computerised system of accounts and inventory maintained internally by the plaintiff itself during the material times (described by the plaintiff's witnesses as the SAP system) in respect of the transactions in question here has since been replaced with a new and upgraded computerised system of accounts and inventory.

[4] After a lengthy full trial involving numerous questions on the entries in the said print-out records and after having heard the evidence of the witnesses for the parties and the closing submissions, this court came to the conclusion that the print-out records of the previous internal computerised accounting and inventory system which were relied upon as evidence contained errors and anomalies and were not reliable records for proving the plaintiff's sizeable claims of about RM3.8m against the defendant in the court. This court thereby allowed only a small fraction of the plaintiff's total claims to the extent admitted by the defendant and dismissed the rest of the plaintiff's claims as well as dismissed the defendant's counterclaims.

[5] Being dissatisfied with the said decision the plaintiff has appealed against the said decision.

PARTIES' PLEADINGS

[6] As a brief summary, the plaintiff's claims are for: (a) price of gas supplied and the rentals for the gas cylinders totalling RM377,302.66 alleged to be unpaid and outstanding; (b) replacement costs of gas cylinders, delivery pallets, cylinder caps and other related equipment in the total amount of RM3,272,550 allegedly converted and not returned by the defendant; and

(c) costs of damage to 11 pallets and the gas cylinders therein which were returned in October 2021 in the total amount of RM189,450.

[7] In its amended defence and counterclaim the defendant denied that there was any unpaid amount of gas supplied or any gas cylinder or related equipment which has not been returned to the plaintiff. The defendant also denied that there was any conversion of any gas cylinder or related equipment nor any damage to the 11 pallets and gas cylinders therein which were returned in October 2021. In the defence, it is alleged that the gas cylinders and related equipment supplied by the plaintiff to the defendant were rusty and/or badly corroded. Further or alternatively, the defendant also alleged that the plaintiff's claims were barred by Limitation Act 1953 and/or barred by prolonged delay which prejudiced the defendant's back-to-back remedy with the end customers. In the defence and counterclaim, the defendant also alleged that the plaintiff has over-billed and the defendant has over-paid for the gas supplied and for the rentals for gas cylinders and related equipment and therefore the defendant counterclaimed for RM975,673.06 and general damages due to the alleged over-payment. It is alleged by the defendant that there were errors and anomalies in the plaintiff's records which led to over-billing and over-payment.

[8] In the reply and defence to counterclaim the plaintiff denied the defendant's allegations and counterclaims.

CAUSE PAPERS AND FULL TRIAL

[9] The trial proceeded for eight days on 13 September 2021, 14 September 2021, 1 October 2021, 18 October 2021, 25 October 2021, 5 November 2021, 10 November 2021 and 23 November 2021 at which the following seven witnesses attended and gave oral evidence:

(a) plaintiff's witnesses:

(i) Yap Haw Lin ('PW1'): his witness statement was marked as 'WS-PW1';

(ii) Lee Chee Teong ('PW2'): his witness statement was marked as 'WS-PW2A' and his supplementary witness statement was marked as 'WS-PW2B';

(iii) Sahiran bin Wahid ('PW3'): his witness statement was marked as 'WS-PW3'; and

(iv) Lee Chee Wei ('PW4'): his witness statement was marked as 'WS-PW4A' and his supplementary witness statement was marked as 'WS-PW4B'.

(b) defendant's witnesses:

(i) Mala Hayati bt Othman ('DW1'): her witness statement was marked as 'WS-DW1'; A

(ii) Nurulliana bt Roslan ('DW2'): her witness statement was marked as 'WS-DW2'; and

(iii) Nor Fahani bt Zinal Ibiadin ('DW3'): her witness statement was marked as 'WS-DW3'. B

[10] The bundles produced at trial were marked as follows:

(a) *ikatan pliding* — BP; C

(b) statement of agreed facts — SAF;

(c) *ikatan dokumen bersama* (*Bhgn A*) — AA1;

(d) *ikatan dokumen bersama* (*Bhgn B — Jld 1*) — AB1; D

(e) *ikatan dokumen bersama* (*Bhgn B — Jld 2*) — AB2;

(f) *ikatan dokumen bersama* (*Bhgn B — Jld 3*) — AB3;

(g) *ikatan dokumen bersama* (*Bhgn B — Jld 4*) — AB4; E

(h) *ikatan dokumen bersama* (*Bhgn B — Jld 5*) — AB5;

(i) *ikatan dokumen bersama* (*Bhgn B — Jld 6*) — AB6;

(j) *ikatan dokumen bersama* (*Bhgn B — Jld 7*) — AB7; F

(k) *ikatan dokumen bersama* (*Bhgn B — Jld 8*) — AB8;

(l) *ikatan dokumen bersama* (*Bhgn B — Jld 9*) — AB9;

(m) *ikatan dokumen bersama* (*Bhgn B — Jld 10*) — AB10;

(n) *ikatan dokumen bersama* (*Bhgn B — Jld 11*) — AB11; G

(o) *ikatan dokumen bersama* (*Bhgn B — Jld 12*) — AB12;

(p) *ikatan dokumen bersama* (*Bhgn B — Jld 13*) — AB13;

(q) *ikatan dokumen bersama* (*Bhgn B — Jld 14*) — AB14; H

(r) *ikatan dokumen bersama* (*Bhgn B — Jld 15* (Part 1)) — AB15A;

(s) *ikatan dokumen bersama* (*Bhgn B — Jld 15* (Part 2)) — AB15B;

(t) *ikatan dokumen bersama* (*Bhgn C*) — C1; and

(u) *ikatan dokumen bersama* (*Bhgn C2*) — C2. I

[11] The following Part C documents were marked as exhibits during trial:

(a) defendant's full-for-empty table at p 71 C-1 — 'D-1';

A (b) defendant's summary for delivery and return at pp 72 to 74 C-1 — 'D-2';

(c) plaintiff's customers return cylinder defect form document No 40176 at p 4 C-1 — 'P-3';

B (d) defendant's calculation for credit note of the sum of RM65,487 at p 58 C-1 — 'D-4';

(e) defendant's photographs of plaintiff's cylinders at pp 67–70 C-1 — 'D-5'; and

C (f) defendant's interest calculation at pp 3–5 C-2 — 'D-6'.

[12] Before the commencement of the trial, it was directed by the court and mutually agreed by the parties that:

D (a) at the full trial, upon the witness' affirmation and confirmation of the contents of his/her witness statement as his/her evidence, the witness statement and its contents are deemed to be read and there is no necessity for the witness to read the contents of the witness statement into the CRT system. This procedure is without prejudice to the rule E against hearsay, ie the principle of evidence which requires witnesses to testify as to facts and matters within their personal knowledge and not on hearsay evidence. Liberty is given to the counsel to ask supplementary or additional question in examination-in-chief to clarify or explain or highlight salient parts of the witness statement before the F cross-examination begins; and

(b) in order to save time and costs at the full trial, the Part A and Part B documents referred to in the witnesses' statements and evidence are marked as per the marking of Agreed Bundles of Documents as 'AA' and G 'AB' numbers respectively followed by the p numbers and there is no necessity to mark the relevant pages of the Part A and Part B documents with separate exhibit numbers again. However, this procedure shall be without prejudice to the rule against hearsay. Part C document, when H either upgraded into Part B document or its original have been tendered by the maker and verified as authentic, shall be marked with a separate exhibit number.

THE PARTIES' CONTRACTUAL RELATIONSHIP

I **[13]** On 2 April 2001, the plaintiff and the defendant entered into a contract of appointment of cylinder gas distributor ('2001 agreement') where the defendant was appointed as the plaintiff's non-exclusive distributor for a period of three years (cll 1 and 10.1, 2001 agreement, pp 5 and 10, AB1).

[14] Thereafter, on 1 June 2005, the plaintiff and the defendant entered into the second agreement ('2005 agreement') where the plaintiff appointed the defendant as its non-exclusive distributor for a period of three years from 1 June 2005 (Recitals 1–2 and cl 1.2, 2005 agreement, pp 20–21, AB1).

[15] After the 2005 agreement lapsed, the plaintiff and the defendant entered into a supply agreement for the appointment of cylinder gas distributor dated 12 November 2008 ('2008 agreement'). The 2008 agreement superseded the 2005 agreement (cll 1 and 11.1, 2008 agreement, pp 3 and 7, AB14; cl 12, 2008 agreement, p 9, AB14).

[16] On 21 December 2011, the plaintiff and the defendant entered into a supply agreement for the appointment of cylinder gas distributor ('2011 agreement') for the period 1 September 2011 to 31 August 2016. The 2011 agreement was the last agreement between the plaintiff and the defendant as it was not renewed thereafter (cll 1 and 11.1, 2011 agreement, pp 42 and 46, AB1).

[17] Pursuant to the agreements, the defendant was given three accounts with the plaintiff at three branches of the plaintiff, namely:

(a) Account No 3000021 ('Petaling Jaya Account');

(b) Account No 3007836 ('Pasir Gudang Account'); and

(c) Account No 3094559 ('Labuan Account').

(statement of account, pp 198–202, AB2).

[18] The 2011 agreement is the basis of the plaintiff's claim against the defendant.

[19] Based on the agreements between the parties, the plaintiff had agreed to sell to D gas products and also to rent and supply to D gas cylinders on a monthly rental basis subject to the terms of the agreements.

PARTIES' PLEADINGS ON CLAIMS AND COUNTERCLAIMS

[20] On 4 September 2018, the plaintiff initiated this claim against D to recover, amongst others, the following:

(a) the sum of RM187,852.66 for the sale of gas and the monthly rental of the gas cylinders;

(b) RM3,272,550 for the plaintiff's equipment that have not been returned by the defendant; and/or

A (c) RM189,450 for the damage of the 11 pallets and cylinders from the defendant.

(Paragraph 14, p 9, re-amended statement of claim, 'Re-ASOC'.)

B **[21]** In the re-amended statement of claim, the plaintiff alleged that there was a total amount of RM187,852.66 as monthly rentals of unreturned gas cylinders which the defendant has failed to pay. The plaintiff alleged that the monthly rentals shall continue until settlement or date of return of the gas cylinders.

C

[22] The second head of claim by the plaintiff is that there are numerous items of equipment valued at RM3,272,550 which the plaintiff supplied to the defendant and which the plaintiff alleged as not yet returned to the by the defendant until to-date. According to the plaintiff, the equipment which D allegedly remained in the defendant's possession are as follows:

Petaling Jaya Account:

Equipment	Particulars of P's Equipment	Quantity (Unit)
CDP-M	Cylinder Delivery Pallets (MOX)	3
CAP-DA	Cylinder Caps	120
CAP	Cylinder Caps	192
68-J15	Specshield 88 Ind MCP15 J Size, 150M3	3
58-J	Specshield 70 Industrial J Size, 10M3	16
4500-J15	SG Type I Mixtures J15	1
30-J15	Specshield 53 Ind MCP15 J Size, 165M3	3
191-J16	Air Medical MCP16 J Size, 102.4M3	1
15-M	D.Acetylene Industrial M Size, 8M3	23
5-J	D.Acetylene Industrial J Size, 6.3M3	3
101-J15	Oxygen Medical MCP15 J Size, 126M3	1
1-J	Oxygen Industrial J Size, 10.7M3	483
1-H	Oxygen Industrial H Size, 7.2M3	290

H Pasir Gudang Account:

Equipment	Particulars of P's Equipment	Quantity (Unit)
EFV-16	Empty MCP Frame 4 x 4	98
CAP-DA	Cylinder Caps	99
CAP	Cylinder Caps	1060
58-J15	Specshield 70 Ind MCP15 J Size, 150M3	1
4500-J16	SG Type II Mixtures J16	2
4500-J	SG Type I Mixtures J	2

42-J15KU	Nitrogen Industrial MCP15 J Size, 144M3	2
30-J15	Specshield 53 Ind MCP15 J Size, 165M3	2
214-JL16	Purified Argon MCP16 J Size	1
214-J	HiQ Argon 5.0 Zero J Size, 8.5M3	1
191-J15	Air Medical MCP15 J Size, 113.6M3	1
15-J	D.Acetylene Industrial J Size, 6.3M3	239
11-J	Argon Industrial J Size, 10.7M3	6
11-A	Argon Industrial A Size, 8.5M3	1
1-J	Oxygen Industrial J Size, 10.7M3	662
1-A	Oxygen Industrial A Size, 8.4M3	129

Labuan Account:

Equipment	Particulars of P's Equipment	Quantity (Unit)
1-H	Oxygen Industrial H Size, 7.2M3	108
15-I	D.Acetylene Industrial I Size, 4.5M3	9

[23] The plaintiff's third head of claim is RM189,450 for the alleged damage of the 11 pallets and cylinders returned by the defendant.

[24] The defendant in its amended defence and counterclaim denied having possession of any of the plaintiff's equipment and further denied owing any money to the plaintiff. It is the defendant's allegation that the plaintiff's records of holdings, quantities of holdings and accounts are erroneous and with many anomalies.

[25] There are counterclaims made by the defendant for alleged over-payments to the plaintiff in the past said to be due to the plaintiff's excessive and erroneous invoices. The amounts of the defendant's counterclaims are RM913,186.28 and general damages.

PART 1 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS ON BACKGROUND FACTS

[26] The plaintiff/Linde Malaysia Sdn Bhd's predecessor in business Malaysian Oxygen Bhd ('MOX') appointed the defendant Ewajaya Sdn Bhd ('the defendant' or 'Ewajaya') as one of its distributors of industrial gases in West Malaysia.

[27] There was a contract of appointment of cylinder gas distributor made between MOX and Ewajaya on 2001 (AB1/1–14A agreed facts, item 4: SAF in encl 31).

[28] The gas distributorship continued in 2005 via an agreement dated 1 June 2005 signed between MOX's s subsidiary MOX Gases Sdn Bhd and Ewajaya (AB1/15–36 agreed facts, item 4: SAF in encl 31).

[29] In 2006 MOX Group of Companies were taken over by Linde Group of Companies, and the name of MOX Gases Sdn Bhd was then changed to Linde Malaysia Sdn Bhd ('the plaintiff' or 'Linde') (AB1/36 PW1's evidence on 13 September 2021).

[30] There was a supply agreement dated 12 November 2008 entered into between the plaintiff and the defendant in 2008: see AB13.

[31] There was supply agreement for the appointment of cylinder gas distributor dated 21 December 2011 signed between Linde and Ewajaya: see AB1/37–50 agreed facts, item 5: SAF in encl 31. The issues raised by Ewajaya in relation to the signing and compilation of this 2010 agreement will be discussed later.

[32] At all material times, the plaintiff appointed many cylinder gas distributors in West Malaysia, and Ewajaya is one of the distributors. This fact is testified by both parties' witnesses and is not in dispute.

[33] At all material times, the plaintiff had seven sales centres and five gas centres in Malaysia. The sales centres in West Malaysia included Petaling Jaya, Penang, Labuan, Pasir Gudang. The gas centres were located near the sales centres (PW2's evidence on 18 October 2021). The plaintiff had an estimated 7,000 customers: PW2's cross-examination evidence on 18 October 2021.

[34] From PW1's evidence on 13 September 2021 and 14 September 2021 and PW2's evidence on 1 October 2021 and 18 October 202, the method and system of business operations of the plaintiff in relation to their distributors at the material times were such that:

(a) each distributor signed one distributorship agreement with the plaintiff and each distributor was allowed to open multiple accounts with the plaintiff, one account for trading and operations vis one sales centre;

(b) each gas cylinder has a unique identification serial number ascribed to it, and each pallet is also identified separately with a distinct serial number;

(c) each distributor was allowed to collect the filled gas cylinders in pallets from any of the sales centre where he has opened an account, return the empty gas cylinders and pallets and accessory equipment to any of the sales centres;

(d) after a distributor has returned the empty gas cylinders at the sales centre, the empty gas cylinder would be sent to the nearest gas centre for re-filling;

(e) after the gas cylinders have been re-filled with gas, the gas cylinders would be put into a pallet at random and be available for any next distributor to collect them at random pursuant to the next distributor's order;

(f) the next distributor who collected the gas cylinders in pallet at random would then send the gas cylinders with pallet to any one of its customers and at any location of the customer's choice; and

(g) the cylinder turn-around (CTA) frequencies at the material times ranged between 2.5 times to four times per year, depending on the distributor and the customer. This means a particular gas cylinder with a unique serial identification number would be handled by several different distributors, used by several different customers and be at different places at various times within the one-year period.

[35] The defendant signed one single contract with the plaintiff and opened three accounts with three sales centres of the plaintiff, namely Petaling Jaya, Pasir Gudang and Labuan. This fact is confirmed in the AB bundle, testified by both parties' witnesses and is not in dispute.

[36] Following the plaintiff's method and system of business operations on gas distribution, the defendant over the years took delivery of filled gas cylinders from the three sales centres, supplied them to its customers at various locations including mostly offshore locations, arranged for the customers to return the empty gas cylinders and pallets to any sales centre at random, collected more filled gas cylinders for distribution to tis customers, and so on and so forth. This fact is testified by both parties' witnesses and is not in dispute.

[37] The plaintiff maintained a system of monitoring and records the incoming and outgoing gas cylinders, pallets and related accessory equipment including:

(a) the staff at the guard house at the entrance of the sales centre would record in writing the quantities of the items returned to the sales centre, including a cylinder returned damage form; and

(b) the office staff would key in the types and quantities of items returned into a computerised software system known as SAP system. The SAP system is a system implemented by the plaintiff as from 2004 to help the plaintiff to key in and record the transactions (including deliveries and returns) at various sales centres and to print out the hard copies of the

keyed in data: PW2's cross-examination evidence on 1 October 2021. PW2 on 1 October 2021 also testified that the defendant as a distributor had no access to the plaintiff SAP system.

[38] However, when a distributor returned to a particular sales centre more quantities of items than was collected at that particular sale centre, the computer system showed a negative holding, indicating more were returned than was taken by the same distributor at that sales centre. This happened to the defendant's transactions with the plaintiff. See evidence of PW1 and PW2 and also the copies of the print-outs from the computerised system produced in the various AB bundles.

[39] The plaintiff's staff at a particular sales centre were only concerned with what transpired at their sales centre, and had no access to nor portfolio to record or tally with what transpired at a different sales centre. See the evidence of PW1 and PW2.

[40] There was no staff assigned by the plaintiff at the head office to carry out reconciliation and treatment of the figures recorded in the various sales centres, with the result that the quantities returned at a sales centre in excess of the quantities collected form the same centre were not credited to the distributor. This created anomalies in the accounts of the defendant with the plaintiff whereby the plaintiff continued to charge rentals for items collected at one sales centre but which were already returned at a different sales centre. See the evidence of PW1 and PW2.

[41] The plaintiff issued credit notes totalling RM1,047,134.46 after having found anomalies and/or discrepancies in the account and records of the plaintiff, thereby reducing the plaintiff's claims against the defendant by the said amount: agreed facts, item 9: SAF in encl 31; see AB2/381–390 for the credit notes. This is also testified by PW1, PW2 and DW1.

[42] It is the plaintiff's case that after the issuance of credit notes, there is an under-payment by the defendant to the plaintiff, while the defendant's case in the counterclaim is that after the issuance of the credit notes there is an over-payment by the defendant to the plaintiff.

PART 2 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO BINDING EFFECT OF 2011 AGREEMENT

[43] At the time of signing the 2011 agreement, the defendant's signatory knew of the nature and character of the agreement which was signed and made between the plaintiff and the defendant. this court accepts the evidence of the

plaintiff's witnesses on this point and rejects DW1's evidence which purports to impugn the validity and binding effect of the 2011 agreement. A

[44] A main complaint of the defendant against the terms of the 2011 agreement was the addition of the clause on interest of 2% per month. However, even this interest clause was not new in the 2011 agreement, as the same interest clause of 2% per month was introduced in the 2008 agreement as well (see AB14/3–19). B

[45] This court does not accept the defendant's evidence as to the alleged misrepresentation or concealment of the terms of the 2011 agreement. The substantial parts of the 2011 agreement was implemented after it was signed, and the defendant by conduct subsequent to the date of 2011 agreement knew about the contents of the 2011 agreement. C

D

[46] In the circumstances, this court finds that the 2011 agreement and its terms are generally binding upon both parties.

[47] The question whether or not certain term of the 2011 agreement (eg the interest clause) could not be insisted by the plaintiff by reason of estoppel by conduct or representation is a different question to be dealt with under the claim for interest. E

PART 3 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO ANOMALIES IN THE PLAINTIFF'S RECORDS AND ACCOUNT F

[48] Part 1 paras 26–42 (Findings of Background Facts) above are also referred to here. As found and concluded in the said Part 1 paras 26–42 above, there was no staff assigned by the plaintiff at the head office to carry out reconciliation and treatment of the figures recorded in the various sales centres, with the result that the quantities returned at a sales centre in excess of the quantities collected form the same centre were not credited to the distributor. This created anomalies in the accounts of the defendant with the plaintiff whereby the plaintiff continued to charge rentals for items collected at one sales centre but which were already returned at a different sales centre. G H

[49] The equipment movement and holding records, which the plaintiff used for invoicing the defendant and for computing its claims in the present action, were those summarised in AB3/52–288. There are anomalies in these equipment movement and holding records. The existence of many anomalies in the plaintiff's equipment movement and holding records led to disputes raised by the defendant, meetings and discussions on the anomalies, and eventually resulted in the plaintiff's issuance of a number of credit notes I

totalling RM1,047,134.46 after having found anomalies and/or discrepancies in the account and records of the plaintiff, thereby reducing the plaintiff's claims against the defendant by the said amount: agreed facts, item 9: SAF in encl 31; see AB2/381–390 for the credit notes and also the evidence of PW1, PW2 and PW3 on this point.

[50] The details and items of anomalies and discrepancies which formed the subjects of the credit notes can be found in the defendant's 16 pages of summary of disputes for 2011–2016 (AB3/35–48) and in the plaintiff's 60 pages of summary by Ng Cheng Meng (AB2/39–98); see also WS-DW1 Q&A 10. After Ng Cheng Meng's 60 pages of report, the defendant found more items of disputes and anomalies: AB1/80–262 WS-DW1 Mala Hayati, Q&A 10. On 8 June 2018 the plaintiff issued credit notes totaling RM1,047,134.46: WS-DW1 Mala Hayati, Q&A 10; AB2/381–390 plaintiff's credit notes totaling RM1,047,134.

[51] During the cross-examination, none of the plaintiff's witnesses was able to explain why there were so many adjustments (both positive adjustments and negative adjustments) in the plaintiff's records of movements and holdings of cylinders, pallets and equipment in the entries stated in the defendant's accounts with the plaintiff.

[52] In addition, there were also items where the negative adjustments (for items returned or erroneously recorded earlier) were not captured in the system and records by corresponding reductions in the quantities of holdings in the records, and the plaintiff's witness could not offer any explanation for them.

[53] Examples of such anomalies and lack of explanation include:

Account No 3000021:

CDP-M	Why became 1 on 27 April 2012 when there was no transaction? Why became 3 again on 27 May 2012 when there was no transaction?	Cross-examination of PW1 on 13 September 2021
CAP	First entry 192; last entry 192; no movement, Why the entry immediately after First entry became 262?	Cross-examination of PW1 on 13 September 2021
15-M	Products delivered in 2012. A total of 241 units for adjustment	Cross-examination of PW1 on 13 September 2021

Account No 3007836:

CAP-DA	27 November 2016 returned 5 units not captured in the system	Cross-examination of PW1 on 13 September 2021
CAP	17 May 2012, entry of 20 under 'Returned', as the last movement. Adjustment of 61 units on 9 June 2017. Quantity of 'Holding' immediately after this jumped up.	Cross-examination of PW1 on 13 September 2021
58-J15	Last transaction on 15 February 2016, and no movement after that. There was an adjustment on 25 October 2016.	Cross-examination of PW1 on 13 September 2021
4500-J16	Last transaction 29 November 2013. adjustments of 11 units between 25 October 2016 to 28 May 2018.	Cross-examination of PW1 on 13 September 2021
4500-J	Last transaction 10 May 2013. After adjustment of -3, the holding quantity still remained as the previous 5.	Cross-examination of PW1 on 13 September 2021
30-J15	First entry on 27 June 2006: why 10 units adjustment on the same day? Another adjustment of -16 on 24 May 2007, but the 'Holding' still remained at 18, same as the previous figure before this negative adjustment.	Cross-examination of PW1 on 13 September 2021
191-J15	Holding 3, adjustment -3, but -3 not reflected in the subsequent holding	Cross-examination of PW1 on 13 September 2021
1-J	27 June 2006 adjustment of 223. 24 June 2007 adjustment of -187.	Cross-examination of PW1 on 14 September 2021

Account No 3094459:

1-H	14 July 2011 was first entry with 45 returned, but no corresponding entry to show it was deducted from the Holdings.	Cross-examination of PW1 on 14 September 2021
15-J	14 July 2011: 35 returned but not reflected in the Holdings.	Cross-examination of PW1 on 14 September 2021
15-M	14 July 2011: 9 returned but not reflected in the Holding	Cross-examination of PW1 on 14 September 2021

The same also goes for the excess items returned as recorded in AB3/4–8 and AB3/273, AB3/166 (9 Nos), AB3/335 (negative holdings -1,134) which were not credited to another branch's account with the defendant: cross-examination of PW2 on 1 October 2021. Negative holding means that in one account with a particular branch, there is no item of that type of equipment held by the distributor, yet the distributor still returned more items of that type of equipment at that branch: see PW2's evidence on 1 October 2021.

[54] As the plaintiff's SAP software system did not allow for the quantity of holdings at a sales centre (meaning more units returned than taken at hat sales centre) to be recorded in the negative, many items of returned quantities in excess of the collection quantities at a particular sales centre were not recognised by the software system through a crediting of the excess returned quantity to the account with another sales centre. PW2 in cross-examination on 1 October 2021 confirmed that there was no automatic mechanism in the then SAP system to record the over-returned quantity to be credited to another branch's account with the defendant. It is also the evidence of the plaintiff's witness that after the disputes with the defendant has reached litigation stage, the plaintiff has recently started and implemented a new software system with bar coding of all gas cylinders which has solved the problem of inability to credit the excess returned quantities at one particular sales centre to the account of the same distributor at another sales centre according to the automatic crediting mechanism using the newly-implemented bar code system: PW2's evidence on 18 October 2021.

[55] On 14 September 2021, PW1 was cross-examined on the examples of excess returned quantities at a sales centre which were not credited to the defendant's account with another sales centre. These examples include 11-J15 (AB3/107), 191-J16 (AB3/147); 25-J15 (AB3/166); 42-I (2006 returned quantity not credited) (AB3/197) 42-J (AB3/200); 44-J (AB3/200); 44-J15 (AB3/211); 38-J (AB3/212); CAP-Da (AB3/212); 42-A (26 August 2010 returned quantity not credited) (AB3/275) 25-J15 (AB3/273); 11-J15 (AB3/261); 4500-J15 (AB3/289).

[56] In the summary of Ng Chee Ming's 60-page report on behalf of the plaintiff (AB2/318, old pagination), the credit notes contained adjustments for entries as from July 2011 (1 item in 2011: see p 319) and in subsequent years until 2016. In the two entries highlighted in bold print in the immediately foregoing paragraph, there are two examples of entries before 2011 which have not been adjusted or reconciled in Ng Chee Ming's 60-page report. This shows that prima facie Ng Chee Ming's 60-page report has not eliminated all the

errors or anomalies in the SAP records. Ng Chee Ming did not come to explain in the court regarding the accuracy and completeness of the contents of his contents.

[57] In the circumstances, this court finds that there are anomalies, errors and mistakes in the plaintiff's previous recording and software system in use during the defendant's time which resulted in the inability to credit the excess quantities returned by the defendant at a particular sales centre to the defendant's account with another sale centre. The plaintiff's witnesses could not deny that the adjustments and credit notes were issued due to the anomalies in the SAP records. None of the plaintiff's witnesses was personally involved in the adjustments for errors and anomalies, nor in the process leading to the issuance of the credit notes. At the trial, the plaintiff did not produce the source records which were used by its staffs at the branches/sale centres to enter the figures into the plaintiff's internal computerised system of records and accounts. There is also no evidence to prove that it has carried out a complete and reliable audit and verification to remove all errors and anomalies in the computerised system of records and accounts by tallying and comparing with the source records. In the circumstances, this court finds that the plaintiff has failed to prove on a balance of probabilities that with the issuance of the credit notes all and whatsoever errors and anomalies which existed previously in the computerised system of records and accounts have been corrected, reconciled and adjusted.

[58] Under cross-examination on 1 October 2018 PW2 confirmed that the adjustments were only started in 2018, although credit notes were issued way back in 2007 and the years before 2018.

[59] From the evidence of the plaintiff's witness, this court finds that this problem was not unique to the defendant, as the same software and recording system (ie the SAP system) during the defendant's time was also used for other distributors and the same procedure and practice of returning the cylinders, pallets and equipment at random to any sales centre of the defendant was also followed by other distributors. Also, there were other distributors who did the transactions and the collection and return of the cylinders, pallets and equipment the same way as the defendant. In the premises, this court does not accept the plaintiff's argument that it was the defendant's obligation, when returning the cylinders, pallets and equipment, to identity and notify the original sales centres from which the items were collected previously.

A PART 4 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO WHETHER THE PLAINTIFF'S RECORDS AND ACCOUNT ARE RELIABLE FOR COMPUTING AND ASSESSING THE QUANTITIES AND AMOUNTS OF THE PLAINTIFF'S CLAIMS AFTER HAVING TAKEN THE B CREDIT NOTES INTO CONSIDERATION

[60] From the evidence adduced (including those summarised in Part 3 paras 48–59 (Findings and Issues Pertaining to Issues in Anomalies in the Accounts) above), the errors, shortcomings and/or anomalies in the plaintiff's C records and account in respect of the defendant's holdings of cylinders, pallets and equipment affected the transactions before 2011 and also the transactions in 2011 to 2016.

D **[61]** The credit notes issued by the plaintiff were in respect of the years 2011 to 2016 (AB2/381–390). In the credit notes, there is no explanation of the calculations for the credit amounts and the time periods in respect of which the credit notes were issued for the reversal of the rentals. None of the plaintiff's witnesses at the trial was able to explain why there were adjustments, be it E positive or negative adjustments in the SAP records. Neither can any of them explain whether or not the rentals which was invoiced prior to the negative adjustments (ie adjustment for failure to credit the excess quantity returned at one branch to the account with another branch) have been reversed out by the credit notes. What is in evidence, which is also logical and common sense, is F that before the date of entry of the negative adjustments, rentals on the affected item of cylinder, pallet or equipment (as the case may be) would have been charged by the plaintiff to the defendant: see cross-examination of PW1 on 14 September 2021 in respect of item 1-H.

G **[62]** None of the plaintiff's witnesses has done a detailed analysis to tally the anomalies and/or errors in the SAP records (including the negative holdings or excess returned quantities with one branch not credited to another branch's account) vis a vis the credit notes to show that each and every anomaly or error H has been corrected and/or eliminated in the process of the issuance of the credit notes. Even the person who assessed and prepared the credit notes was not called to testify in court.

[63] An example of anomaly in the SAP records is equipment 42-J where the I entries between 3 April 2010 and 19 March 2016 show the total quantity of units returned far outnumbered the total quantity of units supplied during the same period, yet the SAP system did not show the negative holding or credit the excess returned quantity to another branch's account (see AB328–329. In the

summary of credit notes in AB2/381–390, the breakdowns of credit note for 42-J are not stated, and none of the plaintiff's witnesses has explained how the credit note amount was arrived at.

[64] In respect of each type of equipment, the entries in the SAP records produced in AB3 bundle shows a starting quantity of holdings carried forward from the preceding period, and the preceding periods for different types of equipment vary from equipment to equipment. For example, 68-J15 has a starting holding quantity of 85 as at 27 January 2017 (see AB3/330), 15-J has a starting holding quantity of 432 as at 5 January 2017 (see AB3//314). None of the plaintiff's witnesses has explained how they began with such carried forward holding quantities or to show the accuracy of such carried forward holding quantities. The SAP system is a system implemented by the plaintiff as from 2004 to help the plaintiff to key in and record the transactions (including deliveries and returns) at various sales centres and to print out the hard copies of the keyed in data: PW2's cross-examination evidence on 1 October 2021. As there are errors or anomalies in the SAP records for the period between 2007 and 2018, there is likelihood of occurrence of similar errors or anomalies in the same SAP system for the period between 2004 and 2006. None of the plaintiff's witnesses has given any evidence whether, and if so, how, the plaintiff has eliminated or reconciled the occurrence of similar anomalies for the period between 2004 and 2006.

[65] In the circumstances, there is no convincing evidence to prove that the credit notes have eliminated every error or anomaly for the transactions in years 2004 to 2016, the period during which the plaintiff's previous SAP system was being implemented. There is also no evidence to prove that the starting holding quantity for each type of equipment stated in the plaintiff's computerised system of records is correct and accurate.

[66] In the cross-examination of the plaintiff's witnesses, the defendant's counsel has shown items of error or anomaly relating to transactions before year 2011. Any error or anomaly that happened in the years before 2011 would translate into a questionable quantity of holding as at the beginning of year 2011.

[67] In AB12/46, the defendant summarised the total quantities delivered and returned during the six years from 2012 to 2018 as follows: total delivery: 10,370 cylinders; total returned: 15,322 cylinders. In the cross-examination PW1 agreed with these quantities.

[68] In AB12/46 the Holdings as at 1 July 2012 was stated as 7,395 cylinders, and the plaintiff has not adduced evidence to contradict this quantity as the Holdings as at 1 July 2012.

[69] In AB12/46, the plaintiff asserted that the total negative adjustments for these years 2012 to 2018 was -2,717. The plaintiff has not computed the total quantity of negative adjustments for cylinders for years 2012 to 2018.

[70] If the defendant's quantities of Holdings as at 1 July 2012 and total negative adjustments are correct, then arithmetically there would be no balance cylinder which has not been returned to the plaintiff. In the present case, the plaintiff has not adduced documentary evidence to prove what was the correct total holdings of cylinders as at 1 July 2012 in order that the final balance quantity (if any) could be calculated after comparing with the total quantities delivered and the total quantities returned for the period subsequent to 1 July 2012.

[71] In relying upon the plaintiff's records of holdings in the form of computer print-outs of the SAP system without doing a specific and detailed analysis of the same in the present case, the plaintiff has left this court in serious doubt as to the correctness and accuracy of the figures and quantities in the plaintiff's claims here.

[72] In light of the evidence and findings summarised in Part 3 and in paras 60–71 above, this court finds on a balance of probabilities that the plaintiff's SAP records and account by themselves are not reliable for computing and assessing the quantities and amounts of the plaintiff's claims even after having taken the credit notes into consideration.

[73] In order to this court to assess the quantities of the items claimed by the plaintiff, the plaintiff's SAP records and account have to be corroborated by other independent or separate evidence. The plaintiff's SAP records by themselves are not accurate and reliable evidence of an alleged under-payment by the defendant to the plaintiff in respect of transactions under the supply agreement.

PART 5 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO WHETHER THERE WAS DUPLICATION IN CLAIM FOR VALUES OF LOST CYLINDERS AND EQUIPMENT AND THE CONTINUING RENTALS FROM THE DATES OF SUPPLY

[74] In respect of a particular item of cylinder or pallet, the plaintiff cannot claim both its replacement cost and its continuing rentals. Such claims in combination would be double claims or duplicity in claims.

[75] Although the contract allows the plaintiff to claim for rentals of a particular item or cylinder or pallet, such claim for rentals cannot continue in

perpetuity. There must come a time when the unreturned cylinder or pallet should be treated as a lost item and be claimed as replacement cost and no longer as continuing rentals.

[76] In the context of the contract, this court finds that if a particular cylinder or pallet is not returned after the lapse of six months after the month of delivery notwithstanding the plaintiff's reminder to the defendant to do so and the defendant does not give any reasonable ground for holding onto the particular item longer than that, the plaintiff could claim that item as lost item to be compensated by replacement cost.

PART 6 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO WHETHER THE DEFENDANT AS DISTRIBUTOR IS RESPONSIBLE FOR THE CORRODED OR RUSTY CONDITIONS OF THE GAS CYLINDERS AND PALLETS

[77] Since 2012, the defendant has been asking repeatedly for maintenance and service reports of cylinders: AB13/94 (email dated 24 August 2012) but the plaintiff refused or neglected to provide the same to the defendant. PW1 testified that the maintenance reports were in the possession of the plaintiff and could be provided when requested. When cross-examined on the contents of AB13/94 on 13 September 2021, PW1 could not produce any evidence to show the maintenance reports and book record on procedure of maintenance was ever provided to the defendant and he could not offer any satisfactory explanation for refusal to provide such records in spite of the bona fide dispute by the defendant.

[78] In the 24 August 2012 email (AB13/94), it was recorded that the defendant's client TLO agreed to a joint visit to verify damaged cylinders, and the defendant asked for following documents which TLO wanted prior to joint visit: (a) proof of year of manufacture; (b) maintenance records of each cylinder before delivery April 2011; and (c) standard procedures for maintenance of cylinders (book record): AB12/94 (Matthew Barsing's email to the plaintiff's Calvin Fan and the defendant's Mala Hayati). Also, search procedure and terms (including unjustified search resulting in loss to the defendant) if Linde wanted to search premises of the defendant's clients: p 95.

[79] On 13 September 2021, PW1 was also cross-examined as to the rates for loss of cylinders and the term that all cylinders were subject to end-user's inspection prior to the plaintiff's claim for damage which were stated in the defendant's email dated 29 August 2012 (AB3/21–22).

[80] The plaintiff did not provide the maintenance records and book records on procedure of maintenance which the defendant requested — see PW1's re-examination on 1 October 2021. There is also no evidence of any joint inspection with the defendant's customer TLO in respect of the cylinders and equipment which the plaintiff claimed and charged against the defendant for damage thereto. Subsequently, the plaintiff eventually gave a credit note for non-provision of maintenance report: AB1/121–122 'Credit or debit invoice dated 9.2.12 as customer not agreed on the charges and agreed by sales team to CN credit note the full amount' RM124,485 (see also cross-examination of PW1 on 13 September 2021). This is a recognition by the plaintiff that the proper procedure of implementing the claim for damage to cylinders, pallets and equipment was to promptly conduct a joint inspection in the presence of the representatives of the plaintiff, the defendant and the defendant's relevant customer after the maintenance records and book records on procedure of maintenance had been provided to the disputing parties in order to examine and verify the damage and to prove that the damage was caused by the defendant's relevant customer. By reason of the rotation and random mixing and random distribution of the cylinders, pallets and equipment among different distributors and different customers from time to time as explained in Part 1 above, the proof that the damage (if any) was caused by the defendant's particular customer could not be established unless the aforesaid proper procedure of implementing the claim for damage has been followed promptly after the relevant customer's return of the cylinders, pallets and equipment in question.

[81] This is especially so where the defendant's representatives have recognized and/or admitted that there were rusty or corroded cylinders in very bad conditions which were supplied by the plaintiff to the defendant: see the plaintiff's internal email dated 24 June 2014 by Chua Chin Boon (the plaintiff's regional manager) to many persons in the plaintiff's organization that the cylinders supplied by the plaintiff to the defendant were in really bad conditions, with photographs attached: AB1/98–105. Chua Chin Boon was not called by the defendant as a witness, and no evidence of any diligent or reasonable attempt to call Chua Chin Boon as a witness was adduced. The defendant's counsel has cross-examined the plaintiff's witnesses on this document by Chua Chin Boon and they could not give a satisfactory explanation to negate the admission of this fact by their colleague Chua Chin Boon. The defendant's witness DW1 Mala Hayati has testified that Chua Chin Boon many of the gas cylinders supplied by the plaintiff to the defendant were in very rusty and corroded conditions and that Chua Chin Boon in his email expressly admitted such fact.

[82] As the parties' contract does not have an express and specific term on the procedure of proving a claim for damage to cylinder, pallet or equipment, the plaintiff's claim for damage to cylinder, pallet or equipment has to be established according to the general principles of *causation* under the law of damages as follows:

(a) the plaintiff has to prove that when the cylinder, pallet or equipment was *supplied to and collected* by the defendant or the defendant's customer, it was *in good condition* without any rust or corrosion or damage; and

(b) the plaintiff has to prove that *when* the cylinder, pallet or equipment was *returned* by the defendant or the defendant's customer to the plaintiff, it was *in bad condition* with rust or corrosion or damage.

[83] Proof of items (a) and (b) above would establish the causal link in that the rust, corrosion or damage would then be proven to have been caused by the defendant or the defendant's customer while the cylinder, pallet or equipment was in the custody or use of the defendant's customer during the relevant interim period. Unless the steps (a) and (b) above are followed, the random mixing of the gas cylinders, pallets and equipment among the multiple distributors would result in a situation that the plaintiff cannot point its finger at a particular distributor for having solely or proximately caused the corrosion of cylinders or rusty cylinders or pallets. In the circumstances of the present case, the plaintiff has failed or neglected to prove the causal link because the plaintiff has not proven that the conditions of the gas cylinders when returned by the defendant's end-user customers were significantly or considerably worse than their conditions when supplied and delivered by the plaintiff to the defendant.

[84] After having established the causal link between the rust or corrosion or damage and the defendant or the defendant's customer, there remains the question whether such rust or corrosion or damage to the cylinder, pallet or equipment was within the responsibility of the defendant to compensate the plaintiff.

[85] The 2011 agreement between MOX-Linde Gases Sdn Bhd (now known as Linde Malaysia Sdn Bhd) and the defendant (AB1/37–50) contained, inter alia, the following clauses:

> The Distributor is required to charge the customers for the loss or damage to cylinders, based on MOX-Linde deposit rate as specified in the Agreement': clause 7.2 [AB1/39];
>
> 'damaged but replaceable parts of the cylinders and any maintenance *arising from mishandling* shall be charged to the Distributor at the rates as set out in Schedule B': clause 7.3 [AB1/39];

A The Distributor's duties and responsibilities are to ... (g) upkeep all cylinders held by both the Distributor and MOC-Linde customers serviced by the Distributor and are responsible for all losses, damages and repairs or replacement ...

MOX-Linde undertakes to provide the Distributor with:

B (a) *Cylinder gases conforming to P's standards and specifications*;

(b) Marketing and sales support for the territory designated for the Distributor;

(c) Technical assistance;

C (d) Commercial assistance to support the commercial gas activity (this may *include assistance in running the business, incorporating systems to tract cylinders and maintain stocks, etc*: clause 8 at AB1/39.

10. Notwithstanding any provision contained herein,

D 10.1 all cylinders used hereunder are *on loan basis* by MOX-Linde to the distributor and the said cylinders shall remain the property of MOC-Linde; ...

[86] In cross-examination on 13 September 2021, PW1 testified that the plaintiff is to ensure the safety of cylinders for high pressure gases and the E standards means global standards and also Malaysian standards on industrial gases which includes global standards. In the trial, Work Notice 63 of Linde International (AB12/55–56) was produced to show the conditions of gas cylinders according to Linde International's standards and specifications.

F **[87]** In our present case, the plaintiff knew all along that the great majority of the defendant's customers are offshore customers who used the gas cylinders offshore and as such the gas cylinders and related equipment were prone to the elements of nature such as corrosion by moist air at the seas, etc PW1's evidence; DW1's evidence.

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[88] In the context of the 2011 agreement and the nature of the business operations, natural wear and tear including corrosion due to weather elements or moisture in the air in marine environment is not within the defendant's risks H and responsibilities as a distributor. The defendant however is responsible for 'any maintenance *arising from mishandling*' (cl 7.3 in AB1/39). Where the rust, corrosion or damage to cylinder, pallet or equipment is due to any mishandling by the defendant or the defendant's customer, the defendant would be responsible to the plaintiff for the costs of maintenance in the form of remedial I cost for such rust, corrosion or damage. In the circumstances of the present case the plaintiff has also failed to prove that the allegedly bad conditions of the returned cylinders were within the defendant's responsibility to compensate the plaintiff.

PART 7 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO WHETHER THE PLAINTIFF'S DELAY IN PURSUING THE CLAIMS FOR LOSS OF OR DAMAGE TO THE GAS CYLINDERS AND PALLETS HAS DISENTITLED THE PLAINTIFF FROM CLAIMING THEM BY REASON OF THE PREJUDICE TO THE BACK-TO-BACK ARRANGEMENT WITH THE DEFENDANT'S CUSTOMERS

[89] The defendant's right of back-to-back claims for damaged or lost cylinders and equipment was mutually agreed between the plaintiff and the defendant: AB1/61–62. In the 24 August 2012 email from the defendant to the plaintiff: item (d): new rental system to be discussed with clients as the defendant's contract is rental is back to back charges as per Linde: AB12/95 (encl 104). The existence of and agreement on the defendant's right of back-to-back claims vis a vis their end-user customers was also testified by the defendant's witnesses and was not denied by the plaintiff's witnesses.

[90] The back-to-back arrangement was further confirmed by the plaintiff's letter dated 26 May 2014 by Devamala (Head of Sales — PGP) to the defendant's Matthew/Mala Hayati (AB1/55–56) which stated, inter alia, as follows:

> 3. Damage Cylinders
>
> Please be informed that Ewajaya is required to charge the customers for the loss or damage to the cylinders based on the Linde deposit rate as specified in the Agreement. Damaged but replaceable parts of the cylinders and any maintenance arising from mishandling will be charged to Ewajaya and *Ewajaya is fully responsible to be able to collect these charges on a back to back basis with the clients*. For this purpose we advise Ewajaya to have a comprehensive damaged cylinder policy in place with the clients for the avoidance of doubt.

[91] The practice and procedure of return of cylinders, pallets and equipment at the material times was that on the date of return a Cylinder return Defect Form (CRDF Form) would be filled in by the plaintiff's staff who received the returned items with notes of patent damage recorded and then the truck driver who returned the items would also sign on the CRDF Form: see, for example, AB2/70 cross-examination evidence of PW1 on 13 September 2021.

[92] In the premises, the plaintiff's claim against the defendant for damaged or lost cylinders, pallets and equipment ought to be notified to the defendant in reasonable promptitude so that the defendant could notify its end-user customer to attend a joint inspection for the purpose of the bac-to-back claim to the customer. Such notification should be made within reasonable time after the customer's return of damaged cylinders, pallets and equipment to the

plaintiff or, in a claim for loss, within reasonable time after the customer's failure to return the cylinders, pallets and equipment to the plaintiff within six months after the delivery.

[93] Where the plaintiff by unreasonable delay has deprived the defendant of the realistic opportunity to pursue its back-to-back claim vis a vis the defendant's relevant customer, it is unjust and/or inequitable for the plaintiff to recover compensation from the defendant for damage to or loss of cylinders, pallets and equipment. In the circumstances of the present case this court has found that there was unreasonable and prolonged delay on the part of the plaintiff in making claims for loss or damaged gas cylinder and other related equipment against the defendant and such delay has deprived the defendant of the realistic opportunity to pursue its back-to-back claim vis a vis the defendant's relevant customers. Hence, this court has found that in the circumstances of the present case it is unjust and/or inequitable for the plaintiff to recover compensation from the defendant for damage to or loss of cylinders, pallets and equipment.

PART 8 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO WHETHER THE PLAINTIFF'S CLAIMS OR PART THEREOF WERE TIME-BARRED UNDER THE LIMITATION ACT 1953

[94] The plaintiff has not pleaded running account. The plaintiff has not proved its account with the defendant is a running account (*Stamford College Bhd v Seri Stamford College Sdn Bhd (dahulu dikenali sebagai Stamford College (PJ) Sdn Bhd) & Anor* [2021] MLJU 1386 (onus of proving running account is upon the party who alleges it). Payment for gas cylinders supplied and the rentals are specific and in respect of specific items with different due dates and amounts payable according to the delivery notes and Invoices. This is not in the nature of running account: see decided authorities cited in *Stamford College Bhd v Seri Stamford College Sdn Bhd (dahulu dikenali sebagai Stamford College (PJ) Sdn Bhd) & Anor.*

[95] Rentals were chargeable monthly, with invoice issued on the daily holdings and average holdings on the 27th of each month (PW1's evidence in cross-examination on 13 September 2021) and payable within 60 days following the month of delivery (cl 6.1: AB1/38). Hence, the cause of action for rentals accrued at the end of 60 days following the month of delivery.

[96] As regards the claim for damage to cylinders, pallets and equipment, the cause of action accrued on the day the relevant cylinders, pallets and equipment were returned by the defendant or its respective customer to the plaintiff's sales centre.

[97] Under the contract, a particular cylinder, pallet or equipment is to be categorised as on rental (whereby the plaintiff would charge rentals) or as lost item (whereby the plaintiff would claim its replacement cost). The plaintiff cannot keep charging rentals in perpetuity, as there must come a time when a particular cylinder, pallet or equipment was not returned after the lapse of time must be categorised as lost item instead of item on rental for perpetuity. Different considerations apply to a situation where the cylinder or equipment was eventually returned by the defendant to the plaintiff after much delay, in which event there is no provision in the contract or under the law to prevent the plaintiff from charging the rentals for the delay in returning the cylinder or equipment.

[98] Under the agreement and as practiced between the parties, the gas cylinders were to be used for an average of not less than three cycles per year, or to be used to its finish and returned within an average of four months from the date of supply. As the plaintiff cannot continue to charge monthly rentals in perpetuity for the equipment retained by the defendant and the cause of action accrued at the earliest date when the plaintiff could have sued for the return of the gas cylinder and related equipment or in lieu thereof the value of the gas cylinders and related equipment which were lost or deemed to be lost, the cause of action to sue for loss of gas cylinders and related equipment should accrued at the expiry of six months from the date of supply and delivery by the plaintiff to the defendant. As such the cause of action for the values of the loss of gas cylinders and related equipment accrued at the end of six months following the month of delivery.

[99] From the evidence adduced at the trial (including the evidence of PW1 under cross-examination and the evidence of DW1), this court finds that the following items of the plaintiff's claims are time-barred as the causes of action in respect of these items accrued more than six years before 4 September 2018 (the date of filing the present suit):

Account No 30021:

Item Code	Item or Equipment	Date of last delivery	Quantity	Evidence
CDP-M	Cylinder Delivery Pallets (MOX)	27 May 2012	3	AB3/287–288 cross-examination of PW1 on 13 September 2021
CAP-DA	Cylinder caps	17 April 2012	120	AB3/287–288 cross-examination of
CAP	Cylinder caps	May 2012	192	cross-examination of PW1 on 13 September 2021

68-J15	Specshield 88 Ind MCP15 J size, 150m3	May 2012	3	cross-examination of PW1 on 13 September 2021
58-J	Specshield 70 Ind J size, 10m3	24 April 2012		cross-examination of PW1 on 13 September 2021
191-J16	Air Medical MCP16 J Size, 102.4m3	8 September 2009	1	AB3/268–269; cross-examination of PW1 on 13 September 2021
15-M	D.Acetylene Industrial M Size, 8m3	April 2012	23	AB3/265–266; cross-examination of PW1 on 13 September 2021
101-J15	Oxygen Medical MCO J Size, 126m3	5 September 2011	1	AB3/265 -266; cross-examination of PW1 on 13 September 2021
I-J	Oxygen Industrial J Size, 10.7m3	26 June 2009	483	AB3/253–255; cross-examination of PW1 on 13 September 2021 PW1 on 13 September 2021

Account No 3007836:

Item Code	Item or Equipment	Date of last delivery	Quantity	Evidence
EFV-16	Empty MCP Frame 4 x 4	27 June 2009	98	AB3/230–232; cross-examination of PW1 on 13 September 2021; cross-examination of PW2 on 1 October 2021 (RM784,000)
CAP-DA	Cylinder caps	1 March 2011	99	AB3/225–227; cross-examination of PW1 on 13 September 2021
CAP	Cylinder caps	2 March 2011	1060	AB3/223–225; cross-examination of PW1 on 13 September 2021

214-J	HiQ Argon 5.0 Zero J Size, 8.5m3	17 June 2010	1	AB3/159; cross-examination of PW1 on 13 September 2021
191-J15	Air Medical MCP15 J Size, 113.6m3	14 June 2010	1	AB3/144–145; cross-examination of PW1 on 13 September 2021
11-A	Argon Industrial J Size 10.7m3	10 November 2010	1	AB3/100–101; cross-examination of PW1 on 14 September 2021

It is to be noted that much of the cumulative quantity as at the date of the last delivery was in fact delivered months before the date of the last delivery date but carried forward in the computerised accounts.

PART 9 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO THE PROPER AND/OR REASONABLE QUANTUM OR RATES FOR CLAIMING FOR LOSS OF OR DAMAGE TO THE GAS CYLINDERS, PALLETS AND EQUIPMENT

[100] In the schedules to the 2001 agreement, 2005 agreement and 2011 agreement there were rates stated for the replacement of lost cylinders, pallets and equipment.

[101] The agreements did not stipulate that the rates would be applicable irrespective of the age and conditions of cylinders, pallets and equipment as at the time of supply to the distributor.

[102] It is in evidence in the present case that the plaintiff's supply of cylinders, pallets and equipment to the defendant included many very old cylinders and pallets and many rusty and corroded cylinders in very bad conditions: see colour photographs in SIRIM's Report reproduced in encl 131; colour photographs of cylinders from other bundles of documents reproduced in encl 130; the 24 June 2014 internal email by Chua Chin Boon (the plaintiff's regional manager) to many persons in P's organization that the cylinders supplied by the plaintiff to the defendant were in really bad conditions, with photographs attached showing seriously corroded and/or very rusty conditions: AB1/98–105.

[103] The defendant's Matthew Barsing's letter dated 29 August 2012 to the plaintiff's Devamala, Head of Sales (AB1/51):

Re-Replacement/Loss/Damage cylinders

As discussed with your goodself through tele-conversation, we would like to confirm as follows:

1) All the replacement/loss or damaged cylinders/pallets will be compensated RM100 per cylinder as these cylinders are not new and are being written off (depreciated assets). On top of this, we have been paying monthly rentals for all these cylinders since 2001,

2) The costs of new cylinders are only RM320.00 per cylinder or USD$100.00 per cylinder. 'Linde has inflated the replacement cost to gain profit on this subject'

3) All the cylinders/pallets are subjected to inspection and verified by our customers on the condition of the cylinders prior to delivery to Ewajaya.

4) Please furnish documentation as per e-mail dated 24th August on the condition of the cylinders prior to delivery to Ewajaya'

[104] This court finds that the plaintiff supplied to the defendant gas cylinders which included many old cylinders (some aged more than 20 years and some aged more than ten years) and also gas cylinders in very bad conditions which are rusty or corroded. The rates stipulated in the contract for the replacement cost of cylinders, pallets and equipment were meant for those which are new or rather new but not to old cylinders more than ten years or to cylinders in bad conditions with rust or corrosion. This was also recognised by the conduct of the plaintiff's representatives who did not dispute or rebut the defendant's CEO Matthew Barsing's letter dated 29 August 2012 to the plaintiff's Devamala, Head of Sales (AB1/51).

[105] One the one hand, the plaintiff's claimed rates are too high because the cylinders, pallets and equipment supplied to the defendant were very old and/or in very bad conditions with rust or corrosion. On the other hand, the defendant's proposed rates in its letter dated 29 August 2012 are too low by reason of lapse of nine years since then. In the assessment of this court, taking into consideration the age and conditions of the cylinders, pallets and equipment supplied by the plaintiff to the defendant as shown in the evidence in the present case, a fair and reasonable rate for the replacement costs of cylinders, pallets and equipment in the present case for loss thereof should be 40% of the rates stipulated in the 2011 contract.

PART 10 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO THE PLAINTIFF'S CLAIM FOR INTERESTS AT 2% PER MONTH

[106] In the course of the parties' dealings with each other, the plaintiff did not impose any 2% interest per month upon the defendant in the many years

between 2008 and 2017. The first time the plaintiff wanted to impose the 2% per month interest against the defendant was in 2017 after the defendants had seriously disputed and challenged the plaintiff's recording and accounting system and after the plaintiff had prematurely terminated the contract.

[107] DW1 Mala Hayati has given evidence that during the course of transactions, the plaintiff's representative Calvin Fan had assured and/or represented to the defendant that the plaintiff would not impose the 2% interest per month against the defendant. This court has observed the demeanour of DW1 Mala Hayati and found her evidence on this point to be credible. DW1's evidence is also corroborated by the fact that the plaintiff for many years after the signing of the 2008 agreement did not impose the 2% interest per month against the defendant although there were many times when the defendant's accounts with the plaintiff were overdue in the past.

[108] Calvin Fan has not been called by the plaintiff to testify or to rebut DW1 Mala Hayati's evidence. The plaintiff has not produced any evidence of its efforts to call or subpoena Calvin Fan as a witness in this case.

[109] In the circumstances this court finds and holds that by reason of estoppel by conduct or representation the plaintiff is not entitled to insist on the enforcement of the clause on 2% interest per month in the present case.

PART 11 OF THIS COURT'S FINDINGS AND DECISIONS: FINDINGS AND DECISION ON ISSUES PERTAINING TO THE DEFENDANT'S COUNTERCLAIMS

[110] In our present case, the defendant counterclaims for:

(a) RM914,038.28 as excess payment made by the defendant to the plaintiff; and

(b) interests and costs.

[111] The defendant argues that it is entitled to set off the total amount of RM1,047,134.46 by reason of the credit notes issued by the plaintiff. As the credit notes totalling RM1,047,134.46 have been used by the plaintiff to reduce the plaintiff's claims against the defendant, it has been credited in favour of the defendant and any award of this claim for the credit notes amount after having credited it from the plaintiff's account would be a duplication in claims. Hence, this argument of the defendant does not have to be considered in the defendant's counterclaim anymore.

[112] As regards credit note of RM65,487 yet to be issued by the plaintiff, this court finds that the in-principle arrangement to issue such credit note was

made in the course of or in furtherance of the mediation proceeding and therefore is inadmissible in evidence here.

[113] As regards the counterclaims for alleged losses due to excessive past payment and the alleged excess payment, this court finds that the defendant has failed to discharge its burden of proving such alleged losses or the amounts thereof. The defendant is basically relying on the plaintiff's SAP records and the fact the credit notes totalling RM1.03m were issued to try to prove over-payment. In Part 4 above, this court has found that the plaintiff's SAP records by themselves are not accurate and reliable evidence of an alleged *under-payment* by the defendant to the plaintiff in respect of transactions under the supply agreement. Likewise, the plaintiff's SAP records by themselves are not accurate and reliable evidence of an alleged *over-payment* by the defendant to the plaintiff in respect of transactions under the supply agreement. Inasmuch as the plaintiff has failed to discharge its burden proving under-payment by reliance on the SAP records without independent or separate evidence to corroborate the allegation, the defendant has also failed to discharge its burden proving over-payment by reliance on the SAP records without independent or separate evidence to corroborate the allegation.

PART 12: SUMMARY OF THIS COURT'S DECISIONS AND CONCLUSION

[114] In Part 4 above, this court has found that in order to this court to assess the quantities of the items claimed by the plaintiff, the plaintiff's records and account have to be corroborated by other independent or separate evidence.

[115] Unfortunately, the plaintiff has based its claims for unpaid rentals, damages to equipment and replacement costs of lost equipment on: (a) the computer print-outs of the SAP system; (b) copies of delivery notes; and (c) tabulated summary of the claim items, quantities and amounts. The plaintiff has not produced copies of all relevant source records of returns of equipment by the defendant or the defendant's customers. None of the plaintiff's staff who keyed in the entries in the SAP system at the material times has come to testify in court. The plaintiff's witnesses in court were not able to testify or explain why there were adjustments, in respect of which periods of time were the adjustments, and how much rentals were previously charged to the defendant's account prior to the date of the adjustment entries.

[116] The only heads of the plaintiff's claims which are corroborated by independent or separate evidence apart from the computer print-outs of the SAP system are: (a) one pallet and 25 cylinders (ie 15 cylinders in the one pallet plus ten loose cylinders) the defendant admits as still keeping them, and of

which ten were sent for SIRIM tests, and (b) damage to the 11 pallets loaded with cylinders returned in October 2017.

[117] Under cross-examination on 25 October 2021, DW1 Mala Hayati admitted that as at the date of trial the defendant still kept one pallet with 15 cylinders stored at its customer's store and also ten loose cylinders which were sent to SIRIM for test. This admission of DW1 forms an independent evidence which corroborates the plaintiff's claim for replacement costs to the extent of the admission, and therefore the plaintiff's claim for replacement costs 1 pallet and 25 cylinders is an item of claim which this court considers as proven without the plaintiff's reliance on the doubtful and unreliable contents of the computer print-outs from SAP records.

[118] In her evidence in cross-examination on 25 October 2021, DW1 also confirmed that the one pallet and 25 cylinders were supplied by the plaintiff to the defendant in or before February 2016. Despite the court suit and the lapse of more than five years since the date of delivery, the pallet and 25 cylinders are still kept by the defendant. In the circumstances, this court finds that the plaintiff is entitled to claim for the replacement costs of the pallet and cylinder at fair value. From the photographs in the SIRIM test report, the cylinders appeared very old. In the premises, this court assesses the replacement costs of the pallet and 25 cylinders at 40% of the contract rates of replacement costs.

[119] The amounts of the plaintiff's claims allowed in respect of one pallet and 25 cylinders are computed as follows:

Equipment	Quantity	Contract rate/unit	Amount allowed (RM)	Document reference
Pallet:				
Replacement cost	1	RM8,000 per pallet	40% x RM8,000 = RM3,200	AB1/54
Cylinders:				
Replacement cost	25	RM1,000 per cylinder	40% x RM1,000 x 25 = RM10,000	AB1/54
			Total: RM13,200.	

Since the one pallet and 25 cylinders have been allowed on the basis of replacement costs with interests as from 1 April 2016, no claim for monthly charges should be allowed as that would result in double claim.

[120] As regards the 11 pallets loaded with cylinders returned in October 2017, this court finds that there is separate evidence by PW3 and PW4 to corroborate as proof without the plaintiff's reliance on the doubtful and

unreliable contents of the computer print-outs from SAP records. From the evidence of PW3 and PW4 and colour photographs in AB12/28–41 and the evidence of PW4 including WS-PW4(B) Q&A 5), this court finds that the 11 pallets and cylinders were re-painted to hide the damage, rust and/or corrosion. Re-painting to hide the damage or the rust or corrosion warrants an inference that the defendant knew the equipment items were damaged or corroded beyond the ordinary wear and tear and hence wanted to conceal such condition. As such, this court accepts the evidence of the plaintiff's witnesses that the 11 pallets and cylinders were damaged, rusty and/or corroded beyond ordinary wear and tear when they were returned by the defendant in October 2017.

[121] In the heat of arguing this head of claim on liability issues, the plaintiff seemed to have overlooked to provide specific proof of the damages and repair costs. None of PW1, PW2, PW3 and PW4 has given any specific evidence of the amounts of repair costs or how the costs were computed. In para 145 of the plaintiff's written submissions, the plaintiff merely referred to and reproduced the table of items and figures from para 12 of the amended statement of claim. The table in para 12 of the amended statement of claim computed the total costs of *replacement* at RM189,450 on the basis of *loss* of cylinders.

[122] It is clear that replacement costs as the basis for claiming damages can only be adopted where the pallets or cylinders in question are lost or are damaged beyond further use or unreturned: see Schedule B to the 2011 agreement.

[123] From the colour photographs of the 11 pallets and the cylinders involved, it can be seen that the pallets and cylinders are not totally useless or unusable. These cylinders in the 11 pallets are in much better condition than the ten cylinders tested by SIRIM (see AB12 in encl 131) and also in better condition than the cylinders which the plaintiff's Chua Chin Boon in June 2014 confirmed to be in very bad conditions (see AB1/98–105). SIRIM suggested that the 11 cylinders could still be used after remedial steps were taken (see AB12). None of the witnesses has alleged that any of the cylinders described in Chua Chin Boon's email of June 2014 was in any way not fit for use. This court finds that there is no evidence nor valid basis for suggesting that the 11 pallets and the cylinders therein were to be condemned as useless or unusable.

[124] In the premises, this court finds that the plaintiff in its statement of claim has claimed on the wrong basis of replacement costs. The proper basis for claiming for these 11 pallets and the cylinders is the contractually-stipulated costs of repairing the damage as per Schedule B to the 2011 agreement plus the monthly rentals for delay in return pursuant to the terms of the agreement.

[125] From Schedule B to the 2011 agreement in respect of damaged cylinders, the chargeable sub-item for these cylinders is 'Painting of each cylinder etc RM12.00 each'. There was no necessity for 'cleaning for mud' or 'cleaning for oil and cement' in respect of these cylinders in the 11 pallets. As there are 11 pallets and 124 cylinders, the total costs of painting these items are RM12 per item x 135 items = RM1,620.

[126] Clause 11 of the agreement provides that the plaintiff shall be entitled to recover the cylinders and equipment upon the termination of the agreement. The agreement ended on 31 August 2016 (AB1/60–61 WS-PW1 Q&A 25), the reasonable time for the defendant to return all the balance cylinders, pallets and equipment to the plaintiff would be three months after 31 August 2016 (ie one average cycle time). In the present case, the 11 pallets and 124 cylinders were returned by the defendant to the plaintiff in October 2017. As such, the defendant has to pay 11 months of rental charges on these 124 cylinders and 11 pallets to the plaintiff.

[127] In item B under Schedule A to the 2011 agreement, the monthly rental rates for industrial gas cylinders is RM7 per cylinder per month and for pallets is RM90 per pallet per month. The rentals for 11 pallets and 124 cylinders for 11 months (December 2016–October 2017) are computed as follows:

Equipment	Quantity	Contract rate/unit	Amount allowed (RM)	Document reference
Pallet:				
Rentals	11	RM90 per pallet per month	RM90 x 11 x 11 RM10,890	AB1/53
Cylinders:				
Rentals	124	RM7 per cylinder per month	RM7 x 124 x 11 = RM9,548	AB1/53
			Total: RM20,438	

[128] In the circumstances, this court finds that the plaintiff is only entitled to RM1,620 as the costs of damage and RM20,438 as rentals for the 11 pallets and cylinders therein pursuant to the terms of the 2011 agreement.

[129] In conclusion, this court allows the plaintiff's claims in the sums of: (a) RM13,200 and interest thereon at 5%pa from 1 April 2016 until the date of full realisation; (b) RM1,620 + RM20,438 = RM22,058 and interest thereon at 5% per annum from 1 November 2017 until the date of full realisation.

[130] All the other claims of the plaintiff are dismissed. The multiple grounds for dismissing these other claims of the plaintiff include all the above-mentioned grounds and as summarised below:

(a) the plaintiff has not discharged its burden of proof on liability issues;

(b) the plaintiff relies on the computer print-outs from its SAP records which contain errors, anomalies and/or discrepancies;

(c) there is no sufficient evidence to prove that the credit notes issued by the plaintiff have completely eliminated or erased the errors, anomalies and/or discrepancies;

(d) after having heard the evidence of the witnesses, this court still has serious doubts at to the accuracy and correctness of the contents of the SAP records which were maintained at the material times;

(e) the prolonged delay on the part of the plaintiff in claiming for damage to or loss of equipment has improperly or wrongfully deprived the defendant of its opportunity to obtain the back-to-back claims vis a vis its customers, though such back-to-back was agreed between the plaintiff and defendant as a material commercial term;

(f) in respect of items claimed as damage to the equipment, the plaintiff has not proved specific evidence on the alleged damage or corrosion, although it was in evidence that the plaintiff also supplied cylinders in very bad conditions (ie very old, rusty and/or corroded) to the defendant;

(g) in respect of items claimed as damage to the equipment, the plaintiff has not proved that the damage was caused by the defendant or the defendant's customers or that the damage was of a nature and extent beyond normal wear and tear and exposure to weather elements;

(h) some of the items claimed by the plaintiff were time-barred under the Limitation Act;

(i) the plaintiff has not produced specific evidence on the quantum of claims; and

(j) in any event, as the cylinders, pallets and equipment supplied by the plaintiff to the defendant have included many very aged cylinders, many rusty or corroded cylinders it is not proper to use the contract rate at 100% as the basis for computing the quantum of the plaintiff's claims.

[131] This court also dismissed all the counterclaims of the defendant.

[132] As the plaintiff has been unsuccessful in the overwhelming majority of its claim and the defendant has also been unsuccessful in all its counterclaims, this court orders that each party should bear its own costs of this suit.

[133] In conclusion, this court ordered and adjudged on 29 December 2021 that the defendant shall pay the following amounts to the plaintiff:

(a) RM13,200 and interest thereon at the rate 5%pa from 1 April 2016 until the date of full realisation; and

(b) RM22,058 and interest thereon at the rate 5%pa from 1 November 2017 until the date of full realisation.

Order accordingly.

Reported by Ashok Kumar